

PROPOSAL FOR A NEW EXECUTIVE ORDER ON ASSASSINATION

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I. INTRODUCTION

"The confrontation that Islam calls for with these godless and apostate regimes, does not know Socratic debates, Platonic ideals nor Aristotelian diplomacy. But it knows the dialogue of bullets, the ideals of assassination, bombing, and destruction, and the diplomacy of the cannon and machine-gun."

al-Qaida Training Manual¹

With the passing of the first anniversary of the terrorist² attacks on America,³ the United States is well on its way to winning

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1. THE AL-QAIDA MANUAL 8, available at <http://www.usdoj.gov/ag/trainingmanual.htm> (last updated Oct. 8, 2002).

2. See USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). The USA Patriot Act provides definitions for "terrorist organization," "domestic terrorism," and "international terrorism." *Id.* § 411. A terrorist organization is defined as one that is (1) designated by the Secretary of State as a terrorist organization under the process established under current law; (2) designated by the Secretary of State as a terrorist organization for immigration purposes; or (3) a group of two or more individuals that commits terrorist activities or plans or prepares to commit (including locating targets for) terrorist activities. *Id.* § 411(a)(1)(A)(i).

3. On September 11, 2001, a total of nineteen members of the terrorist al-Qaida network hijacked four domestic United States passenger jet aircraft while in flight (five terrorists in three of the planes and four in the fourth). The terrorists crashed two of the aircraft into the Twin Towers of the World Trade Center in New York. A third plane crashed into the Pentagon, but the fourth plane was forced down by passengers into a field in Pennsylvania. According to a *New York Times* tally, approximately 3,067 were killed (not including the nineteen terrorists) along with billions of dollars in property loss. *Dead and Missing*, N.Y. TIMES, Feb. 10, 2002, at A12. This figure includes 184 dead at the Pentagon

the War on Terror.⁴ Contrary to the hopes of the al-Qaida terrorist network,⁵ the unprovoked attacks did not ignite a general uprising in the Arab world, either against the West⁶ or against those countries considered as moderate Islamic regimes. In fact, just the opposite has occurred. Not only has there not been a general Muslim *jihad* against the United States or other Western nations, not a single moderate Arab or Islamic government has been toppled by the machinations of the militant Islamic terrorists. In fact, Afghanistan's dictatorial Taliban,⁷ which provided open support to the al-Qaida terrorist network, has been defeated *in toto* on the battlefield and swept into the dust bin of history. Furthermore, in tandem with the destruction of the Taliban, the al-Qaida terrorist network has been significantly weakened and forced into hiding.⁸ Only a handful of totalitarian States dare to provide them any backing or assistance.⁹

(counting the fifty-nine passengers and flight crew on the hijacked plane) and forty dead in Pennsylvania. *Id.*

4. See generally JEFFREY F. ADDICOTT, WINNING THE WAR ON TERROR (2003) (arguing that the War on Terror requires both a military solution in the short term, as well as the long-term solution of promoting normative democratic values—encapsulated in first and second-generation human rights—throughout the community of nations).

5. The al-Qaida terrorist organization, founded in 1989 by Saudi Arabian Osama bin Laden, has been referred to by some as a “virtual state”—having all of the attributes of a nation-state except for a fixed geographic location. See Philip Bobbitt, *Get Ready for the Next Long War*, TIME, Sept. 11, 2002, at 84 (“Al-Qaeda . . . represents a new and profoundly dangerous kind of organization . . . [it] has many of the characteristics of other states . . . but is borderless; it declares wars, makes allegiances with other states and is global in scope but lacks a definable location on the map.”).

6. The term “West” or “Western” refers to the peoples and cultures of Europe and the Western Hemisphere.

7. For almost a decade, the al-Qaida terrorist organization headed by bin Laden operated openly in Afghanistan with the complete support of the Pashtun-dominated Taliban government. See *Killing for the Glory of God, in a Land Far from Home*, N.Y. TIMES, Jan. 16, 2001, at A1. The relationship between the Taliban and the al-Qaida terrorist organization provided a seminal example of state-supported terrorism. See *id.* Afghanistan became a terror training ground for thousands of Arab and non-Arab al-Qaida militants including Kashmiris, Chechens, Uzbeks, Uighurs, and others (including some Americans). See David Rohde & C.J. Chivers, *Qaeda's Grocery Lists and Manuals of Killing*, N.Y. TIMES, Mar. 17, 2002, at A1. The camps produced individuals and cells of well-trained terrorists who infiltrated numerous countries to both recruit additional members and carry-out terrorist attacks. See Philip Shenon & David Johnston, *In Terror Search, F.B.I. Tracks Hundreds in U.S.*, N.Y. TIMES, Oct. 6, 2002, at A1.

8. But see Don Van Natta Jr. & David Johnston, *In Latest Strikes, Officials See Signs of Revived Qaeda*, N.Y. TIMES, Oct. 13, 2002, at A1. The article focuses on the fear that al-Qaida has reconstituted itself into smaller cells and cites a recent tape by Ayman al-Zawahiri (bin Laden's closest lieutenant) threatening continued “attacks on ‘America and it allies.’” *Id.* Senator Richard C. Shelby of Alabama is quoted as saying, “We always warned that there would be more attacks because we have not finished off the Al Qaeda

In prosecuting the War on Terror,¹⁰ the United States of America has been confronted with a myriad of issues concerning how best to deal with the new threat of al-Qaida-styled terrorism and those rogue nations that support terrorism.¹¹ As the leading democracy and only remaining superpower in the world, these concerns are rubricated by a strong desire to follow the rule of law,¹² both in terms of homeland defense and the use of military force in international settings.

From a domestic perspective, the continuing dilemma for democratic policymakers is how best to protect the nation, without curtailing long-recognized civil liberties.¹³ From an international perspective, American policymakers are likewise concerned with adhering to international laws¹⁴ associated with both the lawful-

group. We've disrupted it. We've had them on the run, but they are still around." *Id.*

9. President Bush has forcefully argued that Iraq under Saddam Hussein provided support to al-Qaida. *See, e.g.,* Barbara Crossette, *The War on Terror Points a Country Toward Peace*, N.Y. TIMES, Mar. 3, 2002, at A4.

10. The term "War on Terror" is commonly used to describe the ongoing conflict between the United States and the al-Qaida terror network. *See, e.g., id.* Nevertheless, the Bush Administration has repeatedly indicated that the War on Terror also includes those rogue states who pose a threat to the United States with the possession or desired possession of weapons of mass destruction. *See* President George W. Bush, State of the Union Address (Jan. 29, 2002) available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> [hereinafter State of the Union Address] ("The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons."); *see also* David E. Sanger, *Sends a Warning: In Speech, He Calls Iraq, Iran and North Korea "an Axis of Evil,"* N.Y. TIMES, Jan. 30, 2002, at A1.

11. *See* Erica Goode, *A Day of Terror: The Psychology; Attackers Believed to Be Sane*, N.Y. TIMES, Sept. 12, 2001, at A13 (discussing terrorism in other nations).

12. *See* BLACK'S LAW DICTIONARY 1332 (7th ed. 1999). *Black's* defines "rule of law" as "a substantive legal principle" and "[t]he doctrine that every person is subject to the ordinary law within the jurisdiction." *Id.*

13. *See id.* at 239. The term "civil liberty" is most commonly associated with the provisions set forth in the Bill of Rights. *Black's Law Dictionary* defines "civil liberties" as "[f]reedom from undue governmental interference or restraint," as measured against individual liberties set out in the Constitution. *See id.*

14. The rule of law in international law refers to both that body of law reflected in applicable treaty obligations and in "customary international law." *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987). Customary international law comes from observing past uniformities among nations of a norm or standard that has reached widespread acceptance in the international community. *See id.* § 102 cmt. b. Evidence of customary international law may be found in judicial decisions, the writing of noted jurists, diplomatic correspondence, and other evidence concerning the practice of states. *See id.* § 103. For example, certain categories of human rights, i.e., so-called "first generation human rights," are binding on all nation-states regardless of whether a particular State has entered into a specific treaty. *See id.* § 324 cmt. e.

ness of the use of force¹⁵ and the appropriate application of that force.¹⁶ Without question, the most pressing issue in the international realm centers on the Bush Administration's promotion of a legal rationale for the preemptive use of military force against al-Qaida-styled terrorists or rogue states who pose a direct or gathering threat to the United States¹⁷ by means of weapons of mass destruction ("WMD").¹⁸

Juxtaposed to the issue of crafting a legal basis for the use of preemptive military force is the recurring issue of whether certain individuals—such as high level al-Qaida officials or leaders of totalitarian states which support or sponsor terrorism—can be legally targeted for "assassination." In other words, if preemptive military force is an acceptable addition to the rule of law, can the United States simply kill selected high-level leaders without having to employ large-scale military forces against the offending rogue nation or terrorist organization?

There are two principle documents associated with these concerns. Respectively, they are the *National Security Strategy of the United States of America* ("National Security Strategy") released by the White House on September 17, 2002¹⁹ and Executive Order 12,333 banning assassination.²⁰

The purpose of this article is to provide a policy and legal analysis of the U.S. position regarding assassination, as viewed in the context of the lawful use of preemptive military force. In doing so, the article examines the deficiencies of the current Executive Order 12,333 and suggests that it should be replaced by a new executive order which clearly defines the circumstances under which individuals may be lawfully targeted for death by military forces—either in peacetime or war. Alternatively, if a new

15. See *infra* Part IV.

16. See *infra* Part V.

17. See THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 13–16 (Sept. 2002) [hereinafter NATIONAL SECURITY STRATEGY], available at www.whitehouse.gov/nsc/nss.pdf.

18. See 50 U.S.C. § 2302(1) (2000). A "weapon of mass destruction" is defined as "any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of — (A) toxic or poisonous chemicals or their precursors; (B) a disease organism; or (C) radiation or radioactivity." *Id.*

19. NATIONAL SECURITY STRATEGY, *supra* note 17.

20. Exec. Order No. 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. § 401 (2000).

and more precise executive order is not issued to replace Executive Order 12,333, this article suggests that there are two interlocking principles that militate against overturning Executive Order 12,333. The first of these reasons regards properly interpreting the most common definition of assassination; the second considers the proper use of armed force under the rule of law. Taken together, this article concludes that those who advocate that the ban on assassination should be lifted without modification are essentially advocating that the United States should be able to engage in unlawful killing, or murder.

II. PRESIDENTIAL EXECUTIVE ORDER 12,333

"We have found concrete evidence of at least eight plots involving the CIA to assassinate Fidel Castro from 1960 to 1965."

Church Committee Report²¹

In the days following the September 11 attacks on the United States, the question of retaliation and self-preservation weighed heavily on the minds of policymakers. Instinctively, many in Washington called for an immediate response to the perpetrators behind the attacks, even if it meant engaging in assassination, which some clearly viewed to be in violation of the longstanding Executive Order 12,333 prohibiting assassination by agents of the United States government.²² Indeed, as the War on Terror proceeds, a similar attitude is now widely expressed concerning the matter of toppling the dictator Saddam Hussein by simply killing him.²³ These views represent a misunderstanding of Executive Order 12,333 and the legal basis for responding to aggression.

21. ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465, at 71 (1975) [hereinafter CHURCH COMMITTEE REPORT].

22. Exec. Order No. 12,333, 3 C.F.R. at 200; David G. Savage & Henry Weinstein, *Some Call for Lifting of Assassination Ban*, L.A. TIMES, Sept. 14, 2001, at A24 (stating that in the days following the attack, some lawmakers called for a repeal of the ban).

23. See Fleisher Backs Hussein's Slaying: "One Bullet" Less Costly Than War, Bush Spokesman Says, WASH. POST, Oct. 2, 2002, at A12 [hereinafter *Fleisher Backs Hussein's Slaying*] (stating that an Iraqi assassination of Saddam Hussein would be "welcome").

A. *Historical Background for Presidential Executive Order 12,333*

The genesis of Executive Order 12,333 can be traced back to 1976, when President Gerald Ford issued the first executive order prohibiting political assassination.²⁴ President Ford was prompted to act by a 1975 Congressional Commission (commonly known as the Church Committee) headed by Senator Frank Church, which held hearings on the question of whether the United States had engaged in assassination or assassination plots against certain foreign leaders.²⁵ The most damning portion of the report found that between 1960 and 1965, the Central Intelligence Agency ("CIA") was involved in several plots to assassinate Fidel Castro, dictator of communist Cuba.²⁶

The Church Committee found that the CIA Operation Mon-goose sought to eliminate Castro with a number of unlikely weapons, such as poison-tipped pens and cigars, as well as an exploding seashell that was to be placed near Castro's favorite scuba spots.²⁷ Issuing a document consisting of hundreds of pages, the Church Committee was unable "to make a finding that the assassination plots were authorized by the Presidents or other persons above the governmental agency or agencies involved,"²⁸ but did find "that the system of executive command and control was so ambiguous that it [was] difficult to be certain at what levels assassination activity was known and authorized."²⁹ The Church Committee strongly concluded that assassination was both legally and morally repugnant to a democratic people and should never be associated with the United States: "[A]ssassination is incompatible with American principles, international order, and morality. It should be rejected as a tool of foreign policy."³⁰

24. Exec. Order No. 11,905, 3 C.F.R. 90 (1976).

25. CHURCH COMMITTEE REPORT, *supra* note 21. The Church Committee issued a final report in 1976. See FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755 (1976) [hereinafter FINAL REPORT].

26. See generally Jeffrey F. Addicott & Col. Manuel Supervielle, *Promoting Human Rights Values in Cuba's Post-Castro Military*, 3 J. NAT'L SEC. L. 11 (1999) (examining the opportunity to promote human rights in Cuban military after Castro by analogy to the U.S. efforts following the Cold War).

27. CHURCH COMMITTEE REPORT, *supra* note 21, at 72, 85.

28. *Id.* at 7.

29. *Id.* at 6.

30. *Id.* at 1.

Curiously, despite the exhaustive research done by the Church Committee on assassination and the call for "a statute which would make it a criminal offense,"³¹ Congress never enacted legislation to legally ban the use of assassination as an instrument of foreign policy, leaving the matter to the President via executive order.³² Although executive orders are policy and not law, this distinction is functionally irrelevant, particularly in regard to the politically charged issue of assassination.³³

President Ford's order on assassination mandated that "[n]o employee of the United States Government shall engage in, or conspire to engage in, political assassination."³⁴ Shortly thereafter, President Carter followed suit with his own slightly modified version that deleted the word "political."³⁵ In 1981, President Reagan issued Executive Order 12,333 on assassination.³⁶ The pertinent portion reads: "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."³⁷ Subsequent Presidents have not altered President Reagan's order banning assassination by agents of the United States; thus, Executive Order 12,333 remains in effect.

B. *Calls to Repeal Executive Order 12,333*

A common and reoccurring theme of frustration runs through arguments of those who seek the repeal of Executive Order 12,333.³⁸ This frustration reflects a lack of understanding of what assassination actually means or entails, not what Executive Order 12,333 actually prohibits. In short, the central problem is that

31. *Id.* at 283; *see also id.* at 289–91 (drafting a sample statute for a congressional ban on assassinations).

32. *See* Major Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law*, 172 MIL. L. REV. 1 (2002) (calling for the removal of section 2.11 of Exec. Order 12,333).

33. *See, e.g.,* Gary D. Solis, *Assassination and American Armed Forces*, MIL. L. NEWS, Autumn 2001, at 6.

34. Exec. Order No. 11,905, § 5(g), 3 C.F.R. 90, 101 (1976).

35. Exec. Order No. 12,036, 3 C.F.R. 112, 129 (1978).

36. Exec. Order No. 12,333, § 2.11, 3 C.F.R. 200, 213 (1982). President Reagan's version is actually the same as the Carter executive order.

37. *Id.*

38. *See* Harder, *supra* note 32, at 2 (discussing the "obvious confusion" regarding various meanings attached to assassination).

people use the same word—assassination—and assume that everyone is employing the same meaning. Of course, this situation is aggravated both by the brevity of Executive Order 12,333, which provides no definition for assassination, and the fact that it makes no attempt to distinguish between instances of *lawful* killing and instances of assassination; *unlawful* killing.³⁹

Senator Jesse Helms of North Carolina amplified this confusion when he remarked on September 11, 2001 that he was in favor of taking whatever action was necessary, including assassination, to punish those responsible for the attacks on the United States: "I hope I will live to see the day when it will once again be the policy of the United States of America to go after the kind of sneaky enemies who created this morning's mayhem."⁴⁰ Then, just over a week after the terrorist attacks, senior news correspondent Daniel Schorr forcefully urged policymakers to do away with the ban on assassination.⁴¹ Schorr wrote: "A 25-year-old executive order reflecting the reaction to mindless cold-war plotting against President Castro and other third-world leaders seems totally anachronistic after Sept. 11."⁴² He continued: "It is time to rescind an assassination ban that has no more reason for existing."⁴³ In fact, in the days immediately after the attacks on America, Congressman Bob Barr of Georgia proposed a bill in the House of Representatives which would have nullified Executive Order 12,333.⁴⁴

Fortunately, cooler heads prevailed and Congress passed no legislation regarding Executive Order 12,333.⁴⁵ Shortly thereafter, White House spokesman Ari Fleischer correctly related to reporters that the assassination ban "does not limit America's abil-

39. See Exec. Order No. 12,333, § 2.11, 3 C.F.R. at 213.

40. Chuck McCutcheon, *Flawed Intelligence: No Easy Fix*, 59 CONG. Q., 2145, 2146 (2001).

41. Daniel Schorr, *Stop Winking at "the Ban,"* CHRISTIAN SCI. MONITOR, Sept. 21, 2001, at 11. Schorr also points out that he advocated changing Executive Order 12,333 in 1991 to "spare us from presidential double-talk about designs on the lives of foreign foes." *Id.*

42. *Id.*

43. *Id.*

44. See Terrorist Elimination Act of 2001, H.R. 19, 107th Cong. (2001) (seeking to nullify section 2.11 of Executive Order 12,333).

45. See Harder, *supra* note 32, at 23–26 (discussing similar misstatements about the need to repeal Executive Order 12,333 during the Gulf War).

ity to act in self-defense."⁴⁶ The elimination of terrorists could require, Fleischer remarked, "acts which involved the lives of others."⁴⁷

Although Fleischer rightly understood in September 2001 that the ban on assassination did not prohibit the United States from taking actions in self-defense against specific threats,⁴⁸ he later seemed to have lapsed into the same mindset of misunderstanding. At an October 1, 2002 press conference, Fleischer voiced support for non-American actors seeking to assassinate Saddam Hussein.⁴⁹ When asked about the cost of a possible war with Iraq, spokesman Fleischer remarked: "[t]he cost of a one-way ticket is substantially less than [the cost of war]. . . . The cost of one bullet, if the *Iraqi people* take it on themselves, is substantially less than that."⁵⁰ While the assassination of Saddam Hussein by his own people would not violate Executive Order 12,333, reporters immediately asked Fleischer if the Bush Administration was encouraging assassination.⁵¹ Fleischer shrewdly stopped short of using the term "assassination" in reference to Saddam Hussein,⁵² perhaps remembering that such a call to the Iraqi people would violate the customary law on assassination.⁵³

Without question, the traditional concept of assassination absolutely prohibits one nation from encouraging others, in this case the Iraqi people, to murder the leader of an unfriendly government.⁵⁴ Nevertheless, as the United States gears up for possible war with Iraq,⁵⁵ national news media sources continue to speculate about the assassination of the Iraqi dictator. Numerous newspapers cite reports by "senior intelligence experts,"⁵⁶ which

46. Nancy Benac, *Assassination Ban Gets New Look*, Associated Press, Sept. 22, 2001, available at <http://www.fas.org/sgp/news/2001/09/ap092201.html>.

47. *Id.*

48. See *infra* text accompanying notes 181–82.

49. See Walter Pincus, *Attack May Spark Coup in Iraq, Say U.S. Analysts*, WASH. POST, Oct. 6, 2002, at A1.

50. *Id.* (emphasis added).

51. See *Fleisher Backs Hussein's Slaying*, *supra* note 23. "Asked whether the administration was advocating the assassination of Hussein, Fleischer repeatedly replied: 'Regime change is welcome in whatever form that it takes.'" *Id.*

52. See *id.*

53. See *infra* Part III.

54. See *infra* Part III.

55. See *infra* notes 156–59 and accompanying text.

56. See, e.g., Pincus, *supra* note 49.

state that Saddam Hussein would probably be assassinated by "members of his inner circle in the final days or hours before U.S. forces launch a major ground attack."⁵⁷

Those who call the loudest for abandoning Executive Order 12,333 mistakenly feel that it might impede the expeditious prosecution of the War on Terror—either against al-Qaida leaders or senior leaders of the handful of totalitarian regimes that back terrorism.⁵⁸ To date, however, neither Congress nor the President has taken steps that would blunt the ban on assassination.⁵⁹ The reason for this inactivity rests in a mixed bag of historical, legal, and policy considerations. Still, there are several strong arguments for abandoning the current executive order on assassination, not because it impedes the War on Terror, but rather, because it is more confusing than helpful in defining the lawful use of military force against legitimate targets—whether in peacetime or war—to include the senior leadership of hostile governments or terrorist groups.

C. Definitions

Before a concept can be properly discussed, it must be properly defined. Nowhere is this maxim more appropriate than in addressing the issue of assassination *vis-a-vis* Executive Order 12,333. "Assassinate" and "assassination" is defined in leading dictionaries as follows: "To kill by surprise or secret assault; to murder by treacherous violence,"⁶⁰ "To murder (a prominent person) by surprise attack, as for political reasons,"⁶¹ "To destroy or injure treacherously;"⁶² "The act of deliberately killing someone, esp[ecially] a public figure, usu[ally] for hire or for political reasons;"⁶³ "To kill suddenly or secretly; murder premeditatedly

57. *Id.* (stating that Defense Secretary Donald H. Rumsfeld has "spoken publicly about Iraqis eliminating Hussein themselves, either through assassination or sending him into exile").

58. See McCutcheon, *supra* note 40, at 2146.

59. See *id.*

60. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 164 (2d ed. 1936).

61. THE AMERICAN HERITAGE COLLEGE DICTIONARY 82 (3d ed. 1993).

62. *Id.*

63. BLACK'S LAW DICTIONARY 109 (7th ed. 1999).

and treacherously,”⁶⁴ “to destroy or denigrate treacherously and viciously.”⁶⁵

A comparison of most definitions reveals that the common meaning associated with the term assassination is “murder by surprise” usually carried out for “political purposes.”⁶⁶ One commentator, Major Tyler J. Harder, believes that the best way to capture the meaning of assassination is to view it as a combination of three essential elements: “(1) a murder, (2) of a specifically targeted figure, (3) for a political purpose.”⁶⁷ Thus, an assassination must contain all three elements or the killing will not meet the requirements of an assassination.⁶⁸ Harder’s approach provides a good starting point because it focuses on the elements of murder—always an illegal act—and politics—a concept generally reserved for activities outside the sphere of warfare.⁶⁹

Since assassination is universally regarded as murder, it is important to distinguish the concept of murder, which is always illegal, from the concept of killing, which may or may not be illegal.⁷⁰ Unfortunately, the distinction between murder and killing is often blurred in modern society, contributing to a lack of clarity on the subject of assassination. Many postmodernists⁷¹ erroneously believe, for example, that it is somehow immoral for the state to take the life of another human being under any circumstances.⁷² For them, the concept of *nullen crimen sine poena* (no crime without punishment) does not extend to taking the life of

64. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 89 (1st ed. 1966).

65. *Id.*

66. Harder, *supra* note 32, at 5.

67. *Id.*

68. *See id.*

69. *See id.*

70. *See supra* notes 60–65 and accompanying text.

71. Postmodernism is a mid-twentieth century intellectual movement that asserts that there is no real objective knowledge, only interpretations. *See* Stephen M. Feldman, *Playing with the Pieces: Postmodernism in the Lawyer’s Toolbox*, 85 VA. L. REV. 151, 157 (1999). The movement is traced to nihilist philosopher Friedrich Nietzsche. *See* LAWRENCE J. HATAB, A NIETZSCHEAN DEFENSE OF DEMOCRACY: AN EXPERIMENT IN POSTMODERNIST POLITICS 13 (1995).

72. *See* AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION (2001).

another human.⁷³ Hence, in their minds, all killing is both immoral and illegal.⁷⁴

Interestingly, definitional problems regarding the lawfulness of killing another human can be traced back to the Biblical prohibition found in the Decalogue at Exodus 20:13 and Deuteronomy 5:17, which many widely regarded English translations, such as the King James version of the Bible, incorrectly render as "Thou shalt not kill."⁷⁵ In fact, the correct translation of the Hebrew into the English is "Thou shalt not murder."⁷⁶ The Hebrew word for "kill" is not used in the prohibitions of Exodus 20:13 and Deuteronomy 5:17. The Hebrew phrase that is used, "*lo tirtzach*," "refers only to the criminal act of homicide, not [for instance] taking the life of enemy soldiers in legitimate warfare."⁷⁷ In fact, the Mosaic law is filled with detailed laws that specifically mandate that the state should lawfully kill certain humans convicted under the rule of law for such crimes as murder, kidnapping, etc.⁷⁸ The Old Testament principle is properly seen as centering on the duty of the state to protect its citizens on interior lines from domestic criminal behavior.

In turn, the Mosaic law also sets out a detailed law of war code which provides for the protection of citizens on exterior lines by specifically authorizing the killing of enemy combatants.⁷⁹ From the Judeo tradition, killing enemy combatants in battle is not murder.⁸⁰

Assassination, then, is clearly identified and properly classified as a type of killing that is unlawful, i.e., a form of murder, and

73. *See id.*

74. *See id.*

75. Exodus 20:13 (King James).

76. *See Exodus 20:13* (New American Standard) ("You shall not murder.").

77. R.B. THIEME, JR., FREEDOM THROUGH MILITARY VICTORY 50-51 (3d ed. 1996).

78. *See, e.g., Exodus 21:12* (New American Standard) ("He who strikes a man so that he dies shall surely be put to death.").

79. *Deuteronomy 20:13* (New American Standard). Deuteronomy contains an entire law of war code relating to the treatment of non-combatants, combatants, and even damage to the environment:

When you besiege a city a long time, to make war against it in order to capture it, you shall not destroy its trees by swinging an axe against them; for you may eat from them, and you shall not cut them down. For is the tree of the field a man, that it should be besieged by you?

Deuteronomy 20:19 (New American Standard).

80. *Id.* 20:13 (New American Standard).

murder is always defined as "the *killing* of a human being with malice aforethought."⁸¹ Although Executive Order 12,333 does not define assassination, this silence certainly provides no support for advocating a "new" definition of assassination that would somehow characterize the concept as anything other than what it is—murder. Furthermore, since murder is an intrinsically illegal act, the definitional problem automatically defeats any reasoned advancement of the proposition that murder, i.e., assassination, can somehow be made lawful.

In other words, if murder is a violation of both domestic and international law, Executive Order 12,333 really does not make illegal something that was not already illegal. Therefore, doing away with Executive Order 12,333 would not allow the United States to engage in assassination, either in peacetime or wartime. Indeed, revoking Executive Order 12,333 would only send a negative signal, suggesting to the world that the United States did away with the ban so that it could commit an illegal act of murder.

III. HISTORICAL ORIGIN OF ASSASSINATION

"War is merely the continuation of policy by other means."

Carl von Clausewitz⁸²

The word "assassination" is derived from the Arabic word "*hashishiyyin*" which refers to the practice of an eleventh century Muslim "brotherhood" that was specifically devoted to killing their religious and political enemies in any manner available.⁸³ Because American history has witnessed the assassination of several Presidents,⁸⁴ most Americans view assassination as something that is carried out against political figures. To be sure, the

81. BLACK'S LAW DICTIONARY 1038 (7th ed. 1999) (emphasis added).

82. CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1976) (1832).

83. FRANKLIN L. FORD, POLITICAL MURDER: FROM TYRANNICIDE TO TERRORISM 99–102 (1985).

84. Presidents Abraham Lincoln, James A. Garfield, William McKinley, and John F. Kennedy were all killed by assassins.

concept of assassination is far more ancient and can apply with equal validity to various infamous incidents in history, including the murder by surprise for political purposes of Julius Caesar by Brutus and his fellow plotters in 44 B.C.,⁸⁵ as well as to Hebrew Zealots who conducted random acts of assassination against the occupying Romans and those who supported the Romans in Judea prior to the fall of Jerusalem by the legions of Rome under Titus in 70 A.D.⁸⁶

There are even historical instances where the concept of assassination was incorporated as an integral part of certain religious beliefs. For example, when the British entered India in the nineteenth century, they encountered a Hindu cult devoted to the goddess Kālī that required its members to commit murder by surprise upon random victims as a form of worship.⁸⁷ In contrast to other assassinations, these murders by surprise were not for political purposes, but for religious purposes.⁸⁸

Early Western scholars discussed the matter of assassination both in the context of war and peace. These scholars generally all viewed assassination as an act directed against the leader of a country.⁸⁹ Interestingly, some of the earliest commentators, such as theologian and philosopher Thomas Aquinas, felt that killing an evil sovereign for the common good might be legally justified.⁹⁰ The Aquinas view held little sway with subsequent commentators,⁹¹ however, particularly following the 1648 Peace of Westphalia and the rise of the nation-state.⁹²

85. See MARGARET LYTTTELTON & WERNER FORMAN, *THE ROMANS: THEIR GODS AND THEIR BELIEFS* 61 (1984) (discussing the murder of Julius Caesar by Brutus, Cassius, and their followers to restore the Republican institution in Rome).

86. FLAVIUS JOSEPHUS, *WARS OF THE JEWS*, in JOSEPHUS: *COMPLETE WORKS* 526-27 (William Whiston trans., Kregel Pub. 1974) (1867).

87. See, e.g., DAVID KINSLEY, *HINDU GODDESSES: VISIONS OF THE DIVINE FEMININE IN THE HINDU RELIGIOUS TRADITION* 116-31 (1986).

88. See *id.*

89. See Lieutenant Commander Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 126-30 (1991).

90. ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, in ST. THOMAS AQUINAS ON POLITICS AND ETHICS 65 n.8 (Paul E. Sigmund ed. & trans., Harvard Univ. Press 1988) (1266-1273) (stating that Aquinas advocated the killing of tyrants in the "medieval equivalent of his doctoral dissertation"). But see *id.* (stating that Aquinas later argues that the fate of tyrants should be left to "the judgment of God" in *De Regimine Princiam*).

91. See FORD, *supra* note 83, at 1-2. Some commentators still voice the assertion that the intentional killing of a tyrant is not per se assassination, particularly if the killing is carried out by the people under the rule of the tyrant. See Ernest W. Lefever, *Death to*

In fact, extremely sensitive to the concept of reciprocity as the key element in international intercourse between nation-states, most seventeenth century scholars rejected the idea of assassinating a leader in peacetime under any circumstances and equally frowned on the use of assassination as a legitimate use of armed force during war.⁹³ Regardless of the method of attack used during warfare, the attack should never involve treachery, a term commonly associated with assassination but seldom defined.⁹⁴ Influenced by the Code of Chivalry,⁹⁵ many international jurists in the area felt that assassination should not be employed in order that the "honor of arms be preserved, and public order and the safety of sovereigns and generals not be unduly threatened."⁹⁶

Hugo Grotius, considered by some the father of international law and author of the first real codification of rules relating to the conduct of warfare, spent a great deal of time exploring the matter of assassination in the context of war.⁹⁷ Grotius used "treachery" or "treacherous murder"⁹⁸ as an analytical starting point in his commentaries.⁹⁹ Understanding the issue of reciprocity, he discussed assassination as something that "violate[s] an express or tacit obligation of good faith" between countries.¹⁰⁰ For Grotius, a violation of natural law or the "law of nations"¹⁰¹ certainly oc-

Saddam Hussein? Let His Own People Decide, L.A. TIMES, Feb. 28, 1991, at B7. Such a killing is called "tyrannicide." See FORD *supra* note 83, at 2.

92. Many trace the origin of international law and the concept of the nation-state to the 1648 Peace of Westphalia, which ended the Thirty Years War. See CHARLES G. FENWICK, INTERNATIONAL LAW 121-22 (4th ed. 1965). It was during this period that a number of European countries recognized themselves as part of a small community of sovereign nation-states which were guided by certain norms and standards of international behavior to include law of war considerations. *Id.*

93. See *infra* notes 97-110 and accompanying text.

94. W. Hays Parks, *Memorandum of Law: Executive Order 12,333 and Assassination*, ARMY LAW., Dec. 1989, at 4, 5.

95. The so-called Code of Chivalry was a compilation of rules associated with the qualities a medieval knight was supposed to possess, such as courage, honor, and the protection of the helpless and women. See LÉON GAUTIER, CHIVALRY 9-32 (Jacques Levrone ed. & D.C. Dunning trans., 1959).

96. Zengel, *supra* note 89, at 125.

97. See HUGO GROTIUS, THE LAW OF WAR AND PEACE, (1625) reprinted in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 16 (Leon Friedman ed., 1972).

98. See Lieutenant Colonel Joseph B. Kelly, Comment, *Assassination in War Time*, 30 MIL. L. REV. 101, 102 (1965) (exploring the views of several early commentators on the matter of assassination).

99. See GROTIUS, *supra* note 97, at 39-41.

100. *Id.* at 38.

101. The term "law of nations" was an early synonym for international law. The United

curred if a leader was killed by those that had an obligation to him; such an act of assassination would be treacherous.¹⁰² Conversely, if an enemy leader is ambushed or tricked into a trap by opposing soldiers and killed, then natural law was not violated.¹⁰³ Grotius wrote: "It is in fact permissible to kill an enemy in any place whatsoever. . . . According to the law of nations not only those who do such deeds, but also those who instigate others to do them, are to be considered free from blame."¹⁰⁴ In any event, Grotius strongly disapproved of putting a price on the head of an enemy leader, reasoning that this would encourage the leader's subjects to kill him treacherously, i.e., by assassination.¹⁰⁵

Alberico Gentili, another prominent scholar of his day, voiced a similar line of argument regarding assassination.¹⁰⁶ A bit more pragmatic in his approach, Gentili cautioned that killing an enemy leader treacherously—by assassination—might actually incite more anger in the enemy population, causing the enemy to fight harder to avenge the murder.¹⁰⁷ In addition, Gentili felt that the very act of assassination itself lacked the valor that one might gain in victory on the field of battle.¹⁰⁸ As did Grotius, Gentili distinguished killing an enemy leader by treacherous means from killing an enemy leader in combat.¹⁰⁹ Death on the battlefield was a lawful circumstance of battle.¹¹⁰

Writing in the eighteenth century, scholar Emmerich de Vattel also defined assassination as "murder committed by a means of treachery."¹¹¹ De Vattel believed that assassination could apply in both peacetime and war, and applied with equal effect, whether

States Constitution also employs the term. See U.S. CONST. ART. I, § 8.

102. See GROTIUS, *supra* note 97, at 39–40.

103. *Id.* at 39.

104. *Id.*

105. *Id.* at 40–41.

106. See 2 ALBERICO GENTILI, *DE IURE BELLI LIBRI TRES* 168–72 (John C. Rolfe trans., William S. Hein & Co., Inc. 1995) (1612).

107. See *id.*

108. See *id.*

109. See *id.*

110. See *id.*

111. 3 E. DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW: APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS* 288 (Charles G. Fenwick trans., William S. Hein & Co., Inc. 1995) (1758).

the deed was done by the people of the leader or subjects of an opposing country.¹¹² De Vattel wrote:

Hence I mean by assassination a murder committed by means of treachery, whether the deed be done by persons who are subjects of him who is assassinated, or of his sovereign, and who are therefore traitors, or whether it be done by any other agent who makes his way in as a suppliant or refugee, or as a turncoat, or even as an alien; and I assert that the deed is a shameful and revolting one, both on the part of him who executes and of him who commands it.¹¹³

Furthermore, de Vattel felt that punishing those individuals who assassinated the sovereign was the responsibility of the world community.¹¹⁴ In his book, de Vattel encouraged all civilized nations "in the interest of the common safety of mankind, to join forces and unite to punish" those who engaged in assassination.¹¹⁵

Thus, the weight of authority from early Western scholars might be encapsulated as follows: First, most defined assassination as an illegal act most commonly associated with targeting and killing enemy leaders in peacetime or war. Second, all early commentators recognized the lawfulness of targeting and killing the enemy leader in war, although some considered killing the enemy leader in a treacherous manner off the battlefield as an act of assassination.

The early American position on the matter viewed assassination as an illegal tool in both peacetime and wartime. The first significant mention of assassination occurred during the American Civil War with the adoption by Union forces¹¹⁶ of a codification of the law of war known as the Lieber Code.¹¹⁷ On April 24, 1863, the Lieber Code was promulgated as Army General Orders

112. *Id.* at 288–89.

113. *Id.* at 288.

114. *See id.* at 289.

115. *Id.*

116. *See* THE LIEBER CODE (1863), reprinted in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 158 (Leon Friedman ed., 1972).

117. *See id.*; *see also* DIETRICH SCHINDLER & JIRÍ TOMAN, THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (1988). Francis Lieber was a German international law scholar and professor at Columbia University. RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 2 (1983). Lieber was asked by the federal authorities to draft a code for the conduct of war on land. *Id.* at 14–15.

Number 100 by the Secretary of War.¹¹⁸ Disregarding the distinction between peacetime and wartime scenarios, Section IX states:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the *assassination of enemies* as relapses into barbarism.¹¹⁹

Since the somewhat confusing definition of the Lieber Code, subsequent American legal views on assassination have improved only slightly. Surprisingly, the next significant mention of the concept of assassination is not found until 1956, in *Field Manual 27-10, Department of the Army Field Manual of the Law of Land Warfare* ("FM 27-10").¹²⁰ FM 27-10 is the Army's non-punitive codification of existing international laws relating to the conduct of armed conflict.¹²¹ Paragraph 31 of FM 27-10, entitled "Assassination and Outlawry," quotes the Annex to the Hague Convention,¹²² stating that "[i]t is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army."¹²³ FM 27-10 then goes on to describe this sentence in the context of American military law:

This article is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy "dead or alive." It does not, however, preclude attacks on individual soldiers or officers of the en-

118. See THE LIEBER CODE, *supra* note 116, at 158. General Orders 100 was entitled: "Instructions for the Government of the Armies of the United States in the Field." *Id.* Two years prior to the Lieber Code, the Southern Confederacy adopted its own code of conduct for land warfare entitled "Articles of War, for the Government of the Army of the Confederate States of America." ARMY REGULATIONS, ADOPTED FOR THE USE OF THE ARMY OF THE CONFEDERATE STATES app., at 171 (Richmond, Va., West & Johnson Publishers 1861). In June of 1863, James A. Seddon, the Confederate Secretary of War, pledged to abide by most of the substantive provisions of the Lieber Code. See HARTIGAN, *supra* note 117, at 1.

119. See THE LIEBER CODE, *supra* note 116, at 184 (emphasis added).

120. DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter FM 27-10], available at <http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/toc.htm>.

121. See *id.* ¶¶ 1-14.

122. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 1, 36 Stat. 2277, 2302, 205 C.T.S. 277, 293.

123. *Id.*, quoted in FM 27-10, *supra* note 120, ¶ 31.

emy whether in the zone of hostilities, occupied territory, or elsewhere.¹²⁴

To date, one of the very best efforts to handle the legal aspects of assassination *vis-a-vis* Executive Order 12,333 is contained in a 1989 legal memorandum written by W. Hays Parks, Chief of the International Law Branch, International Affairs Division, Office of the Judge Advocate General.¹²⁵ In his memorandum, Parks does an excellent job explaining the term assassination “in the context of military operations across the conflict spectrum.”¹²⁶ In essence, Parks correctly concludes that the targeting and killing of hostile or enemy leaders in an act of self-defense¹²⁷ is not an act of assassination, even if by surprise.¹²⁸

IV. THE RULE OF LAW RELATING TO THE USE OF FORCE

“The gravest danger to freedom lies at the perilous crossroads of radicalism and technology. When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology—when that occurs, even weak states and small groups could attain a catastrophic power to strike great nations. Our enemies have declared this very intention, and have been caught seeking these terrible weapons. They want the capability to blackmail us, or to harm us, or to harm our friends—and we will oppose them with all our power.”

President George W. Bush¹²⁹

A. Traditional Rule of Law Regarding the Use of Force

It is well settled in modern international law that no nation may engage in aggression¹³⁰ against any other nation. The defini-

124. *Id.*

125. See Parks, *supra* note 94, at 4.

126. *Id.*

127. See *infra* note 135 and accompanying text.

128. Parks, *supra* note 94, at 8.

129. President George W. Bush, Remarks at Graduation Exercise of the United States Military Academy, West Point, New York (June 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.

130. The U.N. Definition of Aggression states in main part:

Article 1

tion of aggression is spelled out in the 1974 U.N. General Assembly Resolution 3314 and certainly includes the act of assassination.¹³¹ According to the Charter of the United Nations ("U.N. Charter"), "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹³² With this premise so stated, it is thus equally well recognized that the legitimate use of force is rooted in the inherent right of every nation to act in self-defense if it is the object of aggression.

It is also important to realize that aggressive acts are often carried out by one nation against another without the intent to provoke full-scale hostilities or war.¹³³ Likewise, the nation that is

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations

Article 2

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression

Article 3

Any of the following acts, regardless of a declaration of war, shall . . . qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State . . . of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State . . . ;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State . . . in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

G.A. Res. 3314, U.N. GAOR, 29th Sess., Annex, U.N. Doc. A/9890 (1974), reprinted in 1974 U.N.Y.B. 846, 846-48.

131. *Id.*

132. U.N. CHARTER art. 2, para. 4.

133. For a discussion of the policy objectives behind aggressive acts, see MYRES S. McDOUGAL & FLORENTINO P. FELICIANO, THE INTERNATIONAL LAW OF WAR: TRANS-

attacked with aggressive force may respond in self-defense with proportional military action with no intention of going to war.¹³⁴

Article 51 of the U.N. Charter codifies the right of a nation attacked with aggressive violence to engage in self-defense.¹³⁵ The doctrine of self-defense, of course, is a customary right of ancient origin not created by the U.N. Charter.¹³⁶ In pertinent part, Article 51 reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . ." ¹³⁷ Thus, the state that engages in acts of aggression, or the unlawful use of force, may never claim that it is acting under the self-defense provisions of Article 51 of the U.N. Charter. Furthermore, apart from the fundamental requirement of proportionality in the employment of violence for purposes of self-defense,¹³⁸ the use of self-defense can occur in peacetime as well as war.

In the United States, the customary right of self-defense is usually traced to the 1842 Caroline Doctrine formulated by Secretary of State Daniel Webster in response to an 1837 raid by Canadian troops into New York.¹³⁹ Under the Caroline Doctrine a state may resort to necessary and proportional acts of self-defense against aggression if such acts arise out of an instant and overwhelming necessity, leaving no choice of means, and no moment of deliberation.¹⁴⁰ In the 1837 raid, Canadian troops crossed the

NATIONAL COERCION AND WORLD PUBLIC ORDER 11-39 (1994).

134. See *id.* at 241-44.

135. U.N. CHARTER art. 51.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

136. See MCDUGAL & FELICIANO, *supra* note 133, at 131-32.

137. U.N. CHARTER art. 51.

138. See Captain James J. McHugh, *Forcible Self-Help in International Law*, 25 NAVAL WAR C. REV. 61, 65-66 (1972).

139. *Id.* at 65.

140. *Id.*

United States border without American consent to attack rebels in New York.¹⁴¹

On numerous occasions, the United States has lawfully exercised the inherent right of self-defense against individuals or states in both peacetime and wartime environments. President Clinton, for example, fired cruise missiles at several al-Qaida terrorist training camps in Afghanistan following the 1998 al-Qaida attack on the United States embassies in Africa.¹⁴² This military action occurred during peacetime and was permitted under the rule of law regarding self-defense, as President Clinton's actions were a direct result of the al-Qaida attack.¹⁴³ Even if the leader Osama bin Laden was targeted in the attacks, President Clinton's actions would not be classified as attempted assassination.¹⁴⁴

Similarly, in the 1991 Gulf War, Saddam Hussein himself was a legitimate military target and his death by coalition forces would not have been an assassination.¹⁴⁵ As the commander in chief of the Iraqi military, Hussein could have been legally targeted and killed.¹⁴⁶ In war, enemy combatants are legitimate targets for attack so long as the hostile forces are not killed with treachery, e.g., while legitimately visiting a protected place such as a hospital.¹⁴⁷ The fact that Hussein was not specifically targeted was clearly a political decision, although President George H. Bush is said to have remarked: "We're not in the position of targeting Saddam Hussein, but no one will weep for him when he is gone."¹⁴⁸ Despite the lawfulness of killing the enemy leader in wartime, there often exists an unwillingness to specifically target that individual.¹⁴⁹

141. *Id.*

142. James Bennet, *U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied to Terrorist Network*, N.Y. TIMES, Aug. 21, 1998, at A1.

143. *See Parks, supra* note 94, at 5.

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.*

148. *All Things Considered: Time Has Come for Reviewing the Executive Order that Forbids U.S. Government Sponsorship of Political Assassinations* (NPR radio broadcast, Sept. 17, 2001).

149. *Parks, supra* note 94, at 6 n.4.

W. Hays Parks correctly recognizes that a state may use military force in peacetime if it is acting in self-defense since such acts are not considered assassination:

Historically the United States has resorted to the use of military force in peacetime where another nation has failed to discharge its international responsibilities in protecting U.S. citizens from acts of violence originating in or launched from its sovereign territory, or has been culpable in aiding and abetting international criminal activities.¹⁵⁰

After listing several historical examples of the United States' use of military force in self-defense,¹⁵¹ including the 1986 bombing of "terrorist-related targets in Libya,"¹⁵² Parks concludes: "Hence there is historical precedent for the use of military force to capture or kill individuals whose peacetime actions constitute a direct threat to U.S. citizens or U.S. national security."¹⁵³

Indeed, immediately following the terrorist attacks of September 11, 2001, the United States Congress clearly recognized the inherent right of self-defense in peacetime. While Congress never "declared war"¹⁵⁴ under the provisions of Article I of the Constitu-

150. *Id.* at 7.

151. *Id.* Parks lists the following six examples to amplify his point:

—1804–1805: Marine First Lieutenant Presley O'Bannon led an expedition into Libya to capture or kill the Barbary pirates.

—1916: General "Blackjack" Pershing led a year-long campaign into Mexico to capture or kill the Mexican bandit Pancho Villa following Villa's attack on Columbus, New Mexico.

—1928–1932: U.S. Marines conducted a campaign to capture or kill the Nicaraguan bandit leader Augusto Cesar Sandino.

—1967: U.S. Army personnel assisted the Bolivian Army in its campaign to capture or kill Ernesto "Che" Guevara.

—1985: U.S. Naval forces were used to force an Egypt Air airliner to land at Sigonella, Sicily, in an attempt to prevent the escape of the *Achille Lauro* hijackers.

—1986: U.S. naval and air forces attacked terrorist-related targets in Libya in response to the Libyan government's continued employment of terrorism as a foreign policy means.

Id.

152. *Id.*; see also Bob Woodward & Patrick E. Tyler, *U.S. Targeted Qaddafi Compound After Tracing Terror Message*, WASH. POST, Apr. 16, 1986, at A24. The United States specifically targeted the home and headquarters of the Libyan dictator, Colonel Muammar Qaddafi. *Id.* Among the casualties was Qaddafi's adopted daughter. *Id.*

153. Parks, *supra* note 94, at 7.

154. Certain statutory consequences attach to a congressionally declared war. For example, "[w]henever there is a declared war . . . all natives, citizens, denizens, or subjects of the hostile nation or government . . . shall be liable to be apprehended, restrained, se-

tion,¹⁵⁵ Congressional members quickly passed a joint resolution that left no doubt as to their desire to authorize President Bush to use military force in self-defense.¹⁵⁶ This joint resolution was passed by every member of the Senate and every member of the House of Representatives, save one.¹⁵⁷ Among other things, the resolution recognized the inherent right of self-defense “under the Constitution to take action to deter and prevent acts of international terrorism against the United States”¹⁵⁸ The resolution also authorized the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹⁵⁹

Congress clearly understood that targeting individual terrorists associated with the attacks on the United States was not assassination, but an appropriate response in self-defense to unlawful aggression.¹⁶⁰

B. Use of Preemptive Military Force

From a legal perspective, the most challenging issue associated with the continuing War on Terror is the fact that both the nature of the enemy and the nature of the threat have changed dramatically, resulting in a necessary reassessment in the rule of law. In his State of the Union Address of January 29, 2002, President Bush cautioned the American people that although the Taliban regime had been defeated on the battlefield, the War on Terror was far from over.¹⁶¹ In his speech, President Bush also specifically labeled Iraq, Iran, and North Korea as “an axis of

cured, and removed as alien enemies.” 50 U.S.C. § 21 (2000).

155. U.S. CONST. art. I § 8, cl. 11.

156. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

157. [2001–2002] 1 Cong. Index (CCH) 23,027; [2001–2002] 2 Cong. Index (CCH) 37,087.

158. Pub. L. No. 107-40, 115 Stat. 224, 224.

159. *Id.* § 2(a).

160. See McHugh, *supra* note 138, at 76.

161. See Sanger, *supra* note 10.

evil," due to their continuing support and sponsorship of terrorist groups.¹⁶² This statement signaled the President's resolve that the United States would "not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons."¹⁶³

President Bush's speech caused an immediate flurry of debate, both as a policy matter and as a legal matter. Considering that the use of armed force can only be justified under international law when used in self-defense,¹⁶⁴ can the United States go beyond the rhetoric and actually extend the War on Terror to those rogue nations who are identified so closely as supporters and sponsors of terrorist activities, but have not actually physically engaged in overt acts of aggression against the United States? Under what conditions is it permissible for the United States to "go after the haystack and not just the needle?"

Indeed, if the use of WMD by a fanatical terrorist is on the near horizon, do the traditional international rules related to the use of force—i.e., force allowable in self-defense—actually work in the real world of the al-Qaida virtual state?¹⁶⁵ In other words, must the United States idly wait for a catastrophic terrorist attack before it can respond, or does a threatened nation have the right to engage in preemptive self-defense?¹⁶⁶

Although many seemed surprised and/or dismayed that any state would seriously advocate such a position, the concept of preemptive self-defense is not a new doctrine.¹⁶⁷ More commonly known as anticipatory self-defense, this doctrine is a well-

162. *Id.*

163. *Id.*; see also President George W. Bush, Address Before Congress (Sept. 20, 2001), in *Bush Issues Ultimatum to Taliban, Calls upon Nation and World to Unite and Destroy Terrorism*, CONG. Q. WKLY., Sept. 22, 2001, at 2226. President Bush issued the ultimatum in a speech delivered to a joint session of Congress on September 20, 2001. *Id.* at 2226. British Prime Minister Tony Blair echoed this sentiment when he remarked that the Taliban had to "surrender terrorism, or surrender power." Iain MacWhirter, *Does Tony Really Know What He's Getting Us Into?*, THE HERALD (Glasgow), Oct. 3, 2001, at 16.

164. U.N. CHARTER art. 51.

165. Many have described the al-Qaida as a virtual-state in recognition of its complex structure and similar functions to that of the nation-state. Bobbitt, *supra* note 5. All that the organization lacks is a fixed geographic boundary. *Id.*

166. See MCDUGAL & FELICIANO, *supra* note 133 (discussing the considerations behind the use of preemptive self-defense).

167. See JOHN NORTON MOORE, FREDERICK S. TIPSON & ROBERT F. TURNER, NATIONAL SECURITY LAW 154-90 (1990).

established principle of customary international law.¹⁶⁸ The most striking instance in modern history occurred in the 1967 Six Day War when Israel, anticipating a full-scale armed attack from Egypt, Syria, Jordan, and others, attacked Arab airfields first.¹⁶⁹ The doctrine of preemptive self-defense holds that when a state is faced with an imminent armed attack it may resort to proportional acts of preemptive self-defense.¹⁷⁰ Indeed, some scholars view the concept of anticipatory self-defense as inconclusive. For example, one textbook on national security law states: "Past practice is inconclusive, but it suggests that a state facing an imminent and potentially devastating armed attack may escape condemnation for a preemptive response."¹⁷¹

Parks lists three forms of self-defense that the United States recognizes as appropriate for unilateral action under the inherent right of self-defense, including (1) force used "[a]gainst an actual use of force, or hostile act"; (2) "[p]reemptive self defense against an imminent use of force"; and (3) "[s]elf defense against a continuing threat."¹⁷²

In September 2002, one year after the attacks on America, the White House set out its position on the preemptive use of force in the thirty-one page *National Security Strategy*.¹⁷³ In it, the White House assesses the necessity for the use of the doctrine of preemptive military force in self-defense¹⁷⁴—i.e., the *imminence* factor, as follows:

168. See *id.*

169. See Amos Shapira, *The Six-Day War and the Right of Self-Defense*, in MOORE ET AL., *supra* note 167, at 162, 162–63.

170. See MOORE ET AL., *supra* note 167.

171. JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 842 (2002).

172. Parks, *supra* note 94, at 7.

173. See NATIONAL SECURITY STRATEGY, *supra* note 17.

174. Parks' third category of "self defense against a continuing threat" seems to foreshadow the National Security Strategy. Parks, *supra* note 94, at 7. Parks writes:

[Self-defense against a continuing threat] has been exercised on several occasions within the past decade [the 1980s]. It formed the basis for the U.S. Navy air strike against Syrian military objectives in Lebanon on 4 December 1983, following Syrian attacks on U.S. Navy F-14 TARPS flights supporting the multinational peacekeeping force in Beirut the preceding day. It also was the basis for the air strikes against terrorist-related targets in Libya on the evening of 15 April 1986.

Id. at 7 n.8.

It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.¹⁷⁵

After reviewing the success story of strategic deterrence as an effective policy during the Cold War era,¹⁷⁶ the *National Security Strategy* goes on to relate why deterrence will not work against the new and deadly threat of militant Islamic terrorists "whose avowed tactics are wanton destruction and the targeting of innocents; whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness. The overlap between states that sponsor terror and those that pursue WMD compels us to action."¹⁷⁷

Recognizing that the "United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression,"¹⁷⁸ the *National Security Strategy* spells out a three-part policy regarding the use of preemptive self-defense, stating that "[t]o support preemptive options," the United States will (1) "build better, more integrated intelligence capabilities to provide timely, accurate information on threats, wherever they may emerge"; (2) "coordinate closely with allies to form a common assessment of the most dangerous

175. NATIONAL SECURITY STRATEGY, *supra* note 17, at 15.

176. *Id.* at 15. The document stressed two other attendant concerns:

[1] In the Cold War, especially following the Cuban missile crisis, we faced a generally status quo, risk-averse adversary. Deterrence was an effective defense. But deterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations.

[2] In the Cold War, weapons of mass destruction were considered weapons of last resort whose use risked the destruction of those who used them. Today, our enemies see weapons of mass destruction as weapons of choice. For rogue states these weapons are tools of intimidation and military aggression against their neighbors. These weapons may also allow these states to attempt to blackmail the United States and our allies to prevent us from deterring or repelling the aggressive behavior of rogue states. Such states also see these weapons as their best means of overcoming the conventional superiority of the United States.

Id.

177. *Id.*

178. *Id.*

threats"; and (3) "continue to transform our military forces to ensure our ability to conduct rapid and precise operations to achieve decisive results."¹⁷⁹

On a more pragmatic level, the actual use of preemptive force must necessarily seek to address the traditional element of responding to an *imminent* threat, not just a potential threat.¹⁸⁰ While it is certainly prudent for America to sternly warn rogue nations who support or sponsor terrorism that they will be held absolutely accountable for any acts of aggression, the United States must weigh a number of factors prior to actually utilizing the preemptive use of military force. At a minimum, this would mean weighing: (1) the gravity of the threat; (2) the past practices, *mutates mutandis* (in other contexts), of the terrorist or the state that stands behind terrorism; (3) the exhaustion of all other reasonable means short of force; and (4) an assessment of the repercussions if armed force is employed.

Obviously, given the gravity of the threat, reasonable minds can easily conclude that the Bush Administration is correct in its use of preemptive self-defense under the rule of law. The concept of preemptive self-defense is very similar if not synonymous with the long recognized customary doctrine of anticipatory self-defense which is generally permissible when faced with an "imminent" armed attack, such as small-unit engagements, in which combat units need not wait for the enemy to strike.¹⁸¹ Regardless, the use of force in self-defense must be reasonably proportionate to the specific danger that is to be averted.¹⁸²

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.¹⁸³

179. *Id.* at 16.

180. See MCDUGAL & FELICIANO, *supra* note 133, at 231.

181. See Lieutenant Colonel W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, ARMY LAW., Nov. 2000, at 1, 5. But see Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947).

182. MCDUGAL & FELICIANO, *supra* note 133, at 217–18.

183. NATIONAL SECURITY STRATEGY, *supra* note 17, at 15.

Finally, there is a substantive link to the Bush Administration's call for preemptive self-defense and another legal theory known as "counterproliferation self-help."¹⁸⁴ The concept of counterproliferation self-help is concerned with rogue totalitarian States that either seek to acquire WMD or already possess them.¹⁸⁵ The concept argues that when the threat of a totalitarian state or terrorist group using a weapon of mass destruction directly threatens the national survival of another state, the threatened state has the right to engage in "preventive or preemptive use of force to either deter acquisition plans, eliminate acquisition programs or destroy illicit WMD sites at any stage in the proliferator's acquisition efforts."¹⁸⁶ The 1981 Israeli air attack on Iraq's Osiraq nuclear reactor is the best illustration of this doctrine, although the U.N. condemned the attack and proclaimed that Iraq had the right to seek reparations.¹⁸⁷

Interestingly, as the United States prepares to engage Iraq in combat, Congress has essentially concurred in the concept of using military force under President Bush's preemptive self-defense doctrine. On October 12, 2002, Congress passed, by a large margin of bipartisan support, a joint resolution authorizing the use of force against Iraq.¹⁸⁸ The resolution authorizes the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq."¹⁸⁹

C. *The Israeli Model*

How does the concept of preemptive self-defense play out in regards to individuals who pose a threat to the national security interests of the United States? In his third category of legitimate acts of self-defense—"self defense against a continuing

184. See, e.g., Colonel Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENVER J. INT'L L. & POL'Y 483, 485 (1999).

185. See *id.* at 484.

186. *Id.* at 485 (citation omitted).

187. DUNOFF ET AL., *supra* note 171, at 842.

188. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

189. *Id.* § 3(a)(1).

threat”¹⁹⁰—Parks agrees that the preemptive use of military force against terrorists would be permissible and would not be assassination.¹⁹¹ Parks specifically asserts the following:

This right of self defense would be appropriate to the attack of terrorist leaders where their actions pose a continuing threat to U.S. citizens or the national security of the United States. As with an attack on a guerrilla infrastructure, the level to which attacks could be carried out against individuals within a terrorist infrastructure would be a policy rather than a legal decision.¹⁹²

As the United States tests the new doctrine of preemptive self-defense against Iraq, it is useful to consider how the Israelis have employed the concept to target and kill known senior terrorist leaders in the ongoing Palestinian conflict. In fact, the United States has generally supported the Israeli military’s use of preemptive force in regards to the killing of certain Palestinian terrorists.¹⁹³ United States Deputy Secretary of Defense Paul Wolfowitz has often cited the Israeli use of preemption with approval, drawing an early parallel to what Americans must do to win the War on Terror.¹⁹⁴ Wolfowitz noted that “[o]ur approach has been to aim at prevention and not merely punishment. We are at war. Self-defense requires prevention and sometimes preemption.”¹⁹⁵

In this light, the killing of known terrorists is not assassination, but an act of preemptive self-defense. Israel, of course, does not call these acts assassination, although the term is often used by critics to describe the killings of those responsible for the waves of suicide bombings against innocent Israeli citizens.¹⁹⁶ Instead, the Israeli government refers to the acts of killing as “tar-

190. Parks, *supra* note 94, at 7.

191. *Id.*

192. *Id.* at 7 n.8.

193. But see Don Singleton, *U.S. Scolds Israel Civilians Injured in Strike at Terror Chief*, DAILY NEWS (New York), Sept. 28, 2002, at 9. The State Department criticized Israel in a botched attempt to kill the top bomb maker for Hamas, Mohammed Deif. *Id.* Deif reportedly survived an airstrike that wounded thirty-five civilians. *Id.* Nevertheless, the United States has never characterized the killing of terrorists by Israel as assassination. *Id.*

194. See Steven Erlanger, *Russian Aide Warns U.S. Not to Extend War to Iraq*, N.Y. TIMES, Feb. 4, 2002, at A10.

195. *Id.*

196. See Samantha M. Shapiro, *The Year in Ideas: A to Z; Announced Assassinations*, N.Y. TIMES MAG., Dec. 9, 2001, at 54.

geted thwarting," "liquidation," or "elimination."¹⁹⁷ An October 2001 poll taken at Tel Aviv University found that seventy-seven percent of Israeli Jews approved of the policy.¹⁹⁸ Dr. Ely Karmon of the Israel-based International Policy Institute for Counter-Terrorism believes that the Israeli use of preemptive self-defense is in fact the best means of responding to the terrorists since the practice is largely carried out with concern for collateral civilian casualties.¹⁹⁹ Karmon notes that the Israeli military is "not bombing indiscriminately or using heavy weapons as was necessary to hit Hezbollah outposts in Lebanon. Here we have much more control, greater intelligence and the ability to act."²⁰⁰

One recent highly visible public killing was the death of the Secretary General of the Popular Front for the Liberation of Palestine, Mustapha Zibri, on August 27, 2001.²⁰¹ An Israeli helicopter fired two rockets and obliterated his office in Ramallah.²⁰² Zibri's office was located three doors down from the office of Palestinian leader Yasser Arafat.²⁰³

The mechanics for how the killings are carried out generally starts with Israeli intelligence that process reports and information from a variety of sources, which include Palestinian collaborators.²⁰⁴ Using this information, the government compiles a list of people that they have concluded are involved in terrorist activity.²⁰⁵ They next give the Palestinian Authority the list of suspects for arrest, which proves futile since the Palestinian Authority refuses to act on the information.²⁰⁶ Thus, when an opportunity to kill the terrorist presents itself, the approval to kill is given and Israeli helicopters or snipers kill the terrorist by

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Shapiro, *supra* note 196, at 54; see also Matt Rees, *The Work of Assassins: From Both Sides of the Intifadeh, High-Tech Hit Squads and Low-Tech Vigilantes Wield Street Justice*, TIME, Jan. 15, 2001, at 36.

202. Shapiro, *supra* note 196, at 54.

203. *Id.*

204. See Rees, *supra* note 201, at 37.

205. Shapiro, *supra* note 196, at 54.

206. *Id.*

surprise attack at a location calculated to reduce collateral damages to civilians.²⁰⁷

V. APPLICATION OF LEGAL FORCE

"There is a coming terrorist war [against the United States], [that] is part of a total war which sees the whole society as an enemy, and all members of a society as appropriate objects for violent actions."

Jeanne J. Kirkpatrick²⁰⁸

The fact that a nation is acting under the rubric of self-defense does not allow that nation to employ military force in any manner it so desires. The state acting in self-defense is still required to adhere to a set of binding international rules associated with how that force is employed—the law of war or law of armed conflict.²⁰⁹ In the modern era, however, where the line between war and peacetime is inexorably blurred, many of the most basic rules regarding military necessity,²¹⁰ unnecessary suffering²¹¹ and proportionality²¹² apply equally to the peacetime use of military force.²¹³

The law of armed conflict describes lawful targets, which can be destroyed in the proper context of military operations.²¹⁴ The general principle is that military personnel acting in self-defense

207. *Id.*

208. Jeanne J. Kirkpatrick, Speech at the Jonathan Institute's Conference on International Terrorism, Washington, D.C. (June 25, 1984).

209. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 38 (1990).

210. See FM 27-10, *supra* note 120, at ¶ 3. Military necessity refers to the requirement that "belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes." *Id.*

211. *Id.* ¶¶ 2, 34. The concept of unnecessary suffering forbids the use of certain types of weapons calculated to cause unnecessary suffering to people or destruction to property. *Id.* ¶ 34

212. *Id.* ¶ 41. The concept of proportionality refers to the balance between the concrete and direct military advantage to be gained in the light of the amount of damage to be inflicted on the environment and people. *Id.*

213. *Swiss Call a Meeting to Re-Examine the Geneva Conventions*, N.Y. TIMES, Oct. 6, 2002, at A15. The Swiss government invited selected signatories to the Geneva Conventions to update certain provisions in light of the changing nature of armed conflict. See *id.* One issue to be addressed is "how a military objective is appropriately determined and defined in contemporary conflicts." *Id.*

214. See FM 27-10, *supra* note 120, at ¶¶ 39–47.

in a peacetime or wartime environment may kill the enemy, whether lawful combatants or unprivileged belligerents.²¹⁵ It is also clear that "the enemy" may include civilians who take part in the hostilities.²¹⁶ An enemy combatant, whether part of an organized military or a civilian who undertakes military activities, is a legitimate target at all times and may be lawfully killed, even if by surprise.²¹⁷ This includes the leader of the hostile forces.²¹⁸

Thus, unannounced attacks do not preclude the use of violence involving the element of surprise. All "combatants are subject to attack if they are participating in hostilities through fire, maneuver, and assault; providing logistic, communications, administrative, or other support."²¹⁹ In addition, "no distinction is made between an attack accomplished by aircraft, missile, naval gunfire, artillery, mortar, infantry assault, ambush, land mine or booby trap, a single shot by a sniper, a commando attack, or other, similar means."²²⁰ It is not an act of unlawful assassination to kill individuals in this context.²²¹

In turn, the law of armed conflict absolutely prohibits the killing of noncombatants, except as a matter of collateral damage where civilians may be killed ancillary to the lawful attack of a military objective.²²² Civilians that maintain close proximity to a military objective assume the risk of being killed by enemy fire.²²³ Since they are neither specifically targeted individuals nor are they killed by the use of treachery, the killing of such civilians is not an assassination.²²⁴ On the other hand, specifically targeting innocent civilians as a military objective is always illegal and criminal.²²⁵

215. *See id.*

216. *Id.* ¶¶ 80–81.

217. *Id.* ¶¶ 62, 80–81.

218. *Id.*

219. Parks, *supra* note 94, at 5.

220. *Id.*

221. *Id.*

222. *See* FM 27-10, *supra* note 120, at ch. 5.

223. Parks, *supra* note 94, at 5.

224. *Id.*

225. *Id.* at 6.

VI. CONCLUSION: THE NEED FOR A NEW EXECUTIVE ORDER

"[Executive Order 12,333] does not limit America's ability to act in its self-defense."

Ari Fleischer²²⁶

Assassination is an unlawful killing in violation of the rule of law.²²⁷ Whether conducted in peacetime or wartime, assassination is absolutely forbidden under international law even in the absence of an executive order supposedly banning the practice.²²⁸ Anyone who carried out an act of assassination would be guilty of either murder or a war crime, depending on the circumstances.²²⁹ Furthermore, anyone who ordered the assassination would be guilty of either murder or a war crime under the concept of command responsibility.²³⁰

On the other hand, the use of force in legitimate acts of self-defense does not qualify as assassination.²³¹ Those who think that the United States is somehow restricted by Executive Order 12,333 from targeting terrorists or rogue nations that threaten to conduct terrorist acts are mistaken.²³² Nevertheless, if it is the case that Executive Order 12,333 causes more confusion than clarity in understanding the applicable rule of law, should it be repealed? One commentator has argued that the "failure of the executive order to outline exactly what it prohibits has set planners and operators adrift."²³³ But a stronger case can be made by

226. Benac, *supra* note 46.

227. See Parks, *supra* note 94, at 4.

228. *Id.*

229. *Id.*

230. FM 27-10, *supra* note 120, at ¶ 501. Under the concept of indirect responsibility, a commander can be charged with the law of war violations committed by his subordinates if he ordered the crimes committed or knew of the crimes and did nothing to stop them. See *id.* In the United States, this standard of responsibility is known as the Medina Standard. *Id.*; see RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 130-32 (1982). The United States also recognizes the so-called Yamashita Standard where the commander is also held responsible if he should have known about the crimes committed by his subordinates. See *id.* at 86.

231. See Parks, *supra* note 94, at 7-8.

232. *Id.*

233. Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 679 (1992).

pointing out that it is the public, politicians, and commentators that are most confused by the executive order, not the military planners and operators. The military generally understands that the proper application of force in self-defense does not violate Executive Order 12,333. Politicians and commentators seem most susceptible to succumbing to the temptation to apply an overbroad interpretation to the ban on assassination.²³⁴

As a practical matter, it is fundamentally obvious that no American President will ever repeal Executive Order 12,333 unless he immediately replaced it with a better order. The resulting negative repercussions in the sphere of public relations alone would render such a move remarkably insensate. The better order, of course, would require a document consisting of a clear definition of assassination circumstances where the lawful use of force could be applied. As America continues its War on Terror, it is vitally important to operate under clearly framed principles under the rule of law and not shrouded ambiguities and innuendos. Our enemies, as well as our friends and allies, need to understand that the United States of America operates under the rule of law. As Professor John Norton Moore aptly stated: "Law . . . is vitally important. Even in the short run, law serves as a standard of appraisal for national actions and as a means of communicating intentions to both friend and foe, and perceptions about lawfulness can profoundly influence both national and international support for particular actions."²³⁵

Both clarity and respect for the rule of law demands that Executive Order 12,333 be repealed and replaced with a new executive order on assassination that is properly couched in the legal parameters of self-defense. Indeed, a new executive order is far overdue.

234. See *supra* Part II.B.

235. JOHN NORTON MOORE, LAW AND THE GRENADA MISSION 1 (1984).